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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

DALE TAYLOR,

Petitioner,

vs.

LLOYD MECHAM and UINTAH COUNTY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

If one may assert a claim for a deprivation of liberty for malicious prosecution under 42 U.S.C. §1983, what are the elements of that claim?

LIST OF PARTIES

All parties to the proceeding in the Court whose judgment is sought to be reviewed appear by name in the caption of the case. There are no corporate defendants.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dale Taylor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at 82 F.3d 1556 (10th Cir. 1996) and is reproduced in the Appendix filed herewith at 1a. The United States District Court for the District of Utah did not write an opinion, but a copy of its Summary Judgment is reproduced at A-20.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on May 7, 1996. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statute under which this action was brought was 42 U.S.C. §1983 which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

> of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for a redress.

* * *

STATEMENT OF THE CASE

On November 26, 1972, Mr. Greg Nichol was murdered by two assailants in Uintah County in eastern Utah. Mr. Nichol was, at the time of the homicide, in a motor vehicle with a woman, Ranell Stanger, at an overlook point outside of Vernal, Utah.

Ms. Stanger reported that Mr. Nichol was shot as they sat in a car by someone who knocked on the driver's side window when Mr. Nichol opened the window. She described a series of circumstances in which she was raped by two assailants and driven around for most of the night before being released otherwise unharmed.

No arrests were made for the homicide, and the case became inactive. In 1990, Lloyd Mecham was elected Sheriff of Uintah County. Sheriff Mecham reopened the case and discovered that a stepdaughter of Dale Taylor had accused Taylor years earlier of being the perpetrator of the offense. Taking this information which had been known from the beginning of the investigation, Mecham personally reopened the case and conducted the investigation.

Mecham documented his investigation by tape recordings and videotapes of interviews conducted with witnesses. Transcripts of these interviews were prepared,

and hundreds of pages of documents exist with respect to the investigation.

Taylor was arrested for the homicide on August 12, 1992, some twenty years after the murder. Taylor denied any involvement or knowledge of the victims or the incident whatsoever. A preliminary hearing was held in state court, and Taylor was bound over for trial. After spending seven weeks in jail, Taylor was released when DNA evidence could not show that he was a perpetrator of the offense.

On October 4, 1993, Taylor filed a complaint for denial of civil rights under 42 U.S.C. §1983 in the United States District Court for the District of Utah. Taylor claims that the investigation crossed the line from mere negligence to deliberate misrepresentation of facts and reckless disregard for other facts which were exculpatory for himself. Among those misrepresented facts were the following:

a. Ranell Stanger never identified Taylor as a perpetrator. The interview transcripts and a videotape show that Sheriff Mecham tried repeatedly to talk her into identifying Taylor out of a two-photo line-up. At one point, the Sheriff even told Miss Stanger that one of the persons in the two-photo line-up had confessed to the murder and she need only pick the right one. This statement was an outright lie.

b. Sheriff Mecham, in weaving together the story for a probable cause affidavit to support an arrest warrant, relied heavily on Taylor's estranged stepdaughter. A reading of the interview transcripts with the stepdaughter shows that the Sheriff questioned her in a leading

manner and then selected portions of her interview which were supportive of his theory while ignoring excuplatory portions. It is easily observable by reading the interview transcripts that the Sheriff based his conclusions on only certain portions of this informant's story to establish probable cause.

c. Taylor simply did not fit the physical description of either assailant as described by Ms. Stanger.

d. The Sheriff's investigation file has multiple handwritten notes and memoranda by assisting deputies to the effect that the Ms. Stanger story was unbelievable and there was insufficient evidence to support a conclusion that Taylor was the perpetrator. The Sheriff ignored the recommendations of his deputies.

e. The chief deputy swore an affidavit to obtain an investigative subpoena that Ranell Stanger was a prime suspect in the homicide because her story was not credible. However, only a few weeks later, the affidavit presented to obtain an arrest warrant represented that Miss Stanger was a victim and her story was the principal basis for charging Taylor.

f. Stanger always described the vehicle driven by the perpetrators as a tan or gold Ford, possibly "light-colored." Mecham recited in his probable cause affidavit that the perpetrators drove a white Chevrolet which is the type of vehicle Taylor owned at the time the crime was committed. There is no statement ever in the Sheriff's file that a white Chevrolet was involved in the offense.

g. Sheriff Mecham states in the probable cause statement that the perpetrator had been nicknamed "Tex" and alleges that Taylor uses the nickname "Tex." In fact, the Sheriff's investigation file shows that the perpetrator was called Rob or Bob and that the name "Tex" was made up by Stanger herself to describe one of the two perpetrators with a southern accent (which Taylor does not have). Put simply, the only person that referred to the perpetrator as "Tex" was the victim who used it to describe the perpetrator and did *not* report it as a name which the perpetrators had used between themselves, as suggested by the Sheriff.

Taylor was charged with murder in the first degree, a capital offense. Sheriff Mecham was the chief law enforcement officer for Uintah County.

BASIS OF FEDERAL JURISDICTION

The complaint was filed in the United States District Court for the District of Utah as an action claiming a deprivation of civil rights under 42 U.S.C. §1983. Consequently, a federal question was presented which invokes jurisdiction created by 28 U.S.C. §1331.

REASONS FOR GRANTING THE WRIT

This court should grant the writ in order to resolve conflict between the circuits on whether malicious prosecution can form the basis of a 42 U.S.C. §1983 claim and, if so, what are the elements of the claim.

I.

THE TENTH CIRCUIT FAILED TO ARTICULATE AND APPLY A STANDARD

A reading of the opinion of the Tenth Circuit Court of Appeals in this case shows that the court followed its own precedent in recognizing that malicious prosecution may form the basis of a §1983 claim, but reaches a decision without any clear statement of what the elements of the claim are.

To understand where the Tenth Circuit went wrong in its analysis and why that analysis has significance that the Supreme Court should consider this case, one must understand how the issues were framed in the lower courts. To that end, what follows is an explanation of the current law, a statement of what Taylor tried to argue factually and as a matter of law, what the defendants argued factually and as a matter of law, and what the Tenth Circuit actually ruled.

A. The Law of Malicious Prosecution and Section 1983

The Circuit Courts of Appeal have long been in conflict as to whether one may invoke 42 U.S.C. §1983 to assert what amounts to a malicious prosecution claim.

In a dissent to a denial of a petition for writ of certiorari in *Campbell v. Brummett,* 504 U.S. 965 (1992), Justice White pointed out that there is split authority within the circuits of whether one may pursue a malicious prosecution action under §1983. He stated that this court needed to address the issue and provide guidance

to eliminate the conflict between the circuits. This petition suggests that the time anticipated by Justice White is now here and this court should now examine and resolve the issue.

The Tenth Circuit points out in its opinion in this case that "most circuit courts" recognize a malicious prosecution claim is cognizable under §1983 but there remain differences over the elements necessary to establish that claim. Appendix at p. 7.

The United States Supreme Court has never affirmatively stated that malicious prosecution can be the basis for a §1983 action. It has come close in dicta on two recent occasions. In *Albright v. Oliver,* ___ U.S. ___, 114 S. Ct. 807 (1994), the plaintiff had been charged with a crime that did not exist and brought an action under §1983. Plaintiff argued there was a right secured in the constitution to be free from prosecution without probable cause. This court rejected that argument and refused to recognize a substantive right but stated that the opinion was not to be construed to suggest that an action would not exist for a deprivation of liberty under Fourth Amendment analysis.

In *Heck v. Humphrey,* ___ U.S. ___, 114 S. Ct. 2364 (1994), an inmate whose conviction had not been overturned on appeal brought a §1983 action for malicious prosecution. This Court affirmed the dismissal of the §1983 claim because the conviction still stood after judicial review. This Court stated in its opinion that there were circumstances in which a convicted criminal could assert a §1983 claim for malicious prosecution.

In summary, the state of the law now is there is no United States Supreme Court decision which has held on the facts presented that a §1983 action exists for malicious prosecution. The circuits are split on the point with those recognizing such an action probably being in the majority position without agreement on what are the elements of such a cause of action.

B. What the Defendants Argued

1. *Legal Arguments*

This case is on appeal from a motion for summary judgment granted in favor of the defendants. Consequently, it is most logical to consider what defendants argued first.

An examination of the memoranda in the district court and the brief of the defendants in the Tenth Circuit Court of Appeals shows that defendants took a shotgun approach raising every legal doctrine which might exist as a defense to a §1983 action. The principal thrust of the arguments made were that the Sheriff enjoyed qualified immunity because probable cause existed.

The defendant county added the defense that it was immune from liability because the Sheriff was not a person with final policymaking authority under Utah law.

2. *Factual Arguments*

A reading of the briefs filed by both defendants shows that they never argued that being incarcerated without probable cause did not constitute a deprivation

of liberty. Instead, they argued factually that the acts of the Sheriff of which complaint was made were neither material nor critical and that the court could determine the existence of probable cause without those facts. There was no attempt to articulate the standard whereby one may determine why one of the facts that was incriminating of Sheriff Mecham was somehow less important than facts that were not. Defendants simply made the statement that certain facts are not critical.

C. What Taylor Argued

1. Legal Arguments

Taylor had a straight forward response to the motion for summary judgment. Taylor argued that the Sheriff had acted recklessly or with intentional disregard for the facts in constructing a probable cause affidavit. The Sheriff, as policymaker for law enforcement of the county under Utah law, had acted under color of law to deprive Taylor of his liberty through seven weeks of incarceration. Taylor argued that the incarceration constituted an unreasonable seizure under the Fourth Amendment because it was done without probable cause. The elements of malicious prosecution for purposes of §1983 were to be determined by reference to Utah law.

Taylor claimed that the city did not enjoy immunity because the Sheriff was a policymaker under Utah law and the Tenth Circuit Court of Appeals had so held in other cases concerning Utah Sheriffs.

2. *Factual Arguments*

Taylor argued that when one looked at the total story given by the informant, his estranged stepdaughter, it was apparent to the most casual observer that the Sheriff had selected the portions of the story that suited in finding probable cause and had omitted other portions. To that end, Taylor attached in the district court, and as an addendum to his brief with the Tenth Circuit Court of Appeals, an affidavit and exhaustive analysis of expert witnesses that the Sheriff's investigation was grossly deficient, reflected willful malicious acts, and was even "criminal".

Putting it simply, there was a body of facts contained in the probable cause affidavit used to secure his arrest which fell in the categories of having been fabricated, having been taken out of context, and having been distorted so as to obtain an arrest warrant. The resolution of those facts and a conclusion of probable cause were issues of fact for jury determination.

D. The Tenth Circuit Analysis

A reading of the Tenth Circuit opinion in light of the briefing of the parties shows that what the Tenth Circuit did was largely ignore the arguments of the parties, struggle with its own conflicts of standards to be applied, and reach a conclusion by a means which neither party briefed or anticipated.

A reading of the structure of the opinion of the Tenth Circuit shows that the court acknowledged the conflicts between circuits on whether a malicious prosecution

claim existed at all under §1983. The Tenth Circuit fell back on its own case history to acknowledge that it had recognized such actions in prior cases.

The Tenth Circuit, having affirmed its position in the face of conflict with other circuits as to the existence of the cause of action, then acknowledged that the elements of the cause of action were not only different between circuits, but were different between cases decided within the Tenth Circuit itself. See Appendix, p. 10.

The Tenth Circuit explained its struggle of applying an appropriate standard to resolve the case due in part to the opinion of this Court in *Albright*. The court stated that " . . . In many ways, *Albright* muddied the waters rather than clarified them." Appendix, p. 11. The Tenth Circuit went on to say " . . . the Supreme Court specifically avoided deciding whether a Fourth Amendment malicious prosecution claim would succeed."

The Tenth Circuit then engaged in a factual analysis. That is, it read the probable cause affidavit, deleted from consideration those issues which Taylor had put into issue, and concluded that because probable cause still existed that there was no constitutional deprivation of liberty. As will be explained next, there were substantial problems with this analysis.

It should be noted that the Tenth Circuit did not discuss at all the doctrines of qualified immunity, official versus individual capacity doctrines, or any other legal doctrines argued by either party to the litigation on briefing.

WHERE THE TENTH CIRCUIT WENT WRONG IN ANALYSIS

A. Factual Problems

The Tenth Circuit analysis has two serious flaws in its factual analysis. What the Tenth Circuit did was to read the affidavit of probable cause leading to the arrest, omit facts which were stated to be in issue, and then conclude that probable cause continued to exist as a matter of law. This analysis initially fails because it fails to take into account the exculpatory information that was not presented in the probable cause affidavit. The Tenth Circuit has said itself that the knowing and reckless omission of information from an affidavit is actionable under §1983. *Bruning v. Pixler,* 949 F.2d 352 (10th Cir. 1991).

The analytical approach of not looking at the exculpatory information reenforces the very evil which the plaintiff is trying to cure. That is, the Sheriff did not give the complete story in causing the arrest to occur. For example, as pointed out in the brief of Taylor, the Sheriff did not tell the court that the victim Stanger story was not believed by his department as reflected in multiple notes and memoranda and he did not tell the court that Taylor's stepdaughter included in her story that victim Stanger was an accomplice to the murders.

The factual analysis of the Tenth Circuit appears to work on its face when they find as a matter of law there are some facts to suggest probable cause but it fails in the reality of the litigation that not all the facts were presented. Whether probable cause existed is a question of fact. *Moore v. Comesanas,* 32 F.3d 670 (2d Cir. 1994); *DeAnda v. City of Long Beach,* 7 F.3d 1418 (9th Cir. 1993).

The analysis of the Tenth Circuit whereby it ignored exculpatory information runs counter to the spirit and letter of Rule 56 whereby summary judgment should not be granted where there are genuine issues of material fact.

The second major problem with the factual analysis of the Tenth Circuit is that one can easily demonstrate the analysis was erroneous. The Court of Appeals stated at page 15 of the opinion that Taylor presented "no evidence" which "even suggests" that Mecham included false statements or omitted facts with reckless disregard for the truth rather than out of negligence. With all due respect to the Court of Appeals, Taylor finds this statement to be incredulous. Included in the addendum to the brief was an expert affidavit with exhibits totaling about one hundred pages with the expert showing line by line where the Sheriff conducted the investigation in a reckless and indifferent manner with evidence deliberately manufactured to a degree that the expert believed the Sheriff's conduct was "criminal".

Included in the material analyzed by the expert is a transcript of the videotape interview of the Sheriff with victim Stanger in which the Sheriff blatantly disregards constitutional requirements for a photo lineup by using a two-photo lineup and repeatedly telling her that the suspect was one of the two and to pick out the right person. She refused to identify either of the photos as the perpetrator, yet, when the probable cause affidavit was written, the Sheriff suggests that Stanger identified Taylor by saying one of the photos seemed to have familiar eyes to her. Certainly, these acts are objectively deliberate distortions of fact and, at worst, are issues of fact for resolution

by trial rather than as a matter of law by the Tenth Circuit Court of Appeals.

Yet another example of how the Tenth Circuit apparently did not contemplate the record before it at the time it wrote the opinion is the recitation of facts on page 14 of the opinion and described as a "wealth of uncontested facts, demonstrating probable cause". The Tenth Circuit ignores that all of these facts are contained in the expert affidavit and report and placed into dispute. These include the name of the horse as "Trigger", whether there was a pearl handle revolver, and general statements of what the stepdaughter had stated. In the interest of space, each of the responses are not recited herein, but the court's reference is made to the addendum to the brief of the appellant where it will find all of these facts are disputed.

In summary, the factual analysis of the Tenth Circuit probably demonstrates the very problem which Rule 56 was designed to prevent. That is, there is a wealth of facts which are in dispute and which are substantial. Some of these facts are outright misrepresentations which have been documented by expert testimony while others are omissions of exculpatory information which have also been documented by expert testimony. The Tenth Circuit substituted its factual judgment for that of a jury in the face of law which declares that the existence of probable cause for an arrest is a question of fact.

B. Error in Legal Analysis

Perhaps the most obvious error in the legal analysis of the Tenth Circuit is that a reading of the opinion shows that the elements of a §1983 action in this context are uncertain at best. The court wrestles with what other circuits have done and with what its own cases have held. The Court of Appeals states that the elements of a malicious prosecution ought to come out of State law and then ignores Utah law by reciting in the opinion that the preliminary hearing bindover of Taylor was an act which established probable cause and thereby remove the Constitutional taint of his incarceration. In fact, Utah has a controlling case which was cited in Taylor's brief that malicious prosecution is actionable in Utah even though a preliminary hearing has resulted in a bindover for trial. *Potter v. Utah Drive-UR-Self System, Inc.*, 355 P.2d 714 (Utah 1960). As explained in that case, the bindover is only evidence that probable cause may exist but is not conclusive as a matter of law on a subsequent malicious prosecution claim. What the Tenth Circuit did, then, was ignore its own statement that it will apply state law to determine the elements of a §1983 claim. See also *Olson v. Independent Order of Foresters*, 324 P.2d 1012 (Utah 1958).

In summary, the Tenth Circuit erred in this case by recognizing that §1983 claims may exist for malicious prosecution but then failed to articulate clearly the elements of that claim. Combined with the criticism of the Tenth Circuit Court of Appeals of the United States Supreme Court decision in *Albright*, clarification is needed for this area of law.

WHY THIS COURT SHOULD GRANT THIS PETITION

This petition shows the Courts of Appeal are split on whether malicious prosecution may form the basis of a claim under 42 U.S.C. §1983. Even in those circuits which recognize such an action, there are no clear definitions of the elements one must establish. The Tenth Circuit points out itself in the opinion of this case that it is inconsistent on what it has done from case to case and that the available United States Supreme Court guidance is confusing to the Tenth Circuit.

The opinion of the Tenth Circuit here shows that the issue has arisen in probably all of the Circuits, so this cannot be labeled as an arcane point. It is an emerging area of law which lower courts will struggle with until this court moves from the dicta of *Heck v. Humphrey* and *Albright v. Oliver* to deciding squarely whether a §1983 claim exists for malicious prosecution and what the elements of that claim are.

This court is respectfully requested to grant a writ of certiorari to resolve the described conflicts.

CONCLUSION

The Petition for a Writ of Certiorari should be granted for the reasons stated.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DALE TAYLOR, Plaintiff-Appellant, v. LLOYD MEACHAM and UINTAH COUNTY, Defendants-Appellees.	)	No. 95-4008

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. NO. 93-CV-883)
(Filed May 07, 1996)

Gregory J. Sanders (Sandra L. Steinvoort with him on the briefs), Kipp and Christian, P.C., Salt Lake City, Utah, Attorneys for Plaintiff-Appellant.

Robert R. Wallace, Hanson, Epperson & Smith, P.C., Salt Lake City, Utah, Attorneys for Defendants-Appellees.

Before PORFILIO, ANDERSON, and TACHA, Circuit Judges.

ANDERSON, Circuit Judge.

Dale Taylor brought this 42 U.S.C. § 1983 action against Uintah County Sheriff Lloyd Meacham, in his individual and official capacities, claiming he – Mr. Taylor – was illegally arrested, charged with capital homicide in connection with a murder and rape which occurred twenty years previously, and jailed for seven weeks. When DNA tests led County authorities to drop the charges against Mr. Taylor, he was released from custody. Mr. Taylor included supplemental state claims for false arrest, malicious prosecution, and false imprisonment. The district court granted defendants' motions for summary judgment. For the reasons set out below, we hold: (1) the Fourth Amendment governs a malicious prosecution claim brought under § 1983; (2) Sheriff Meacham had probable cause to seek and obtain an arrest warrant and, therefore, committed no Fourth Amendment violation; (3) any malicious prosecution claim against Sheriff Meacham based on events occurring after Mr. Taylor's arrest is vitiated, in this case, by the preliminary hearing and judicial determination to bind Mr. Taylor over for trial; and (4) because Sheriff Meacham committed no constitutional violation, the County is not liable. We therefor affirm the district court's decision.

BACKGROUND

On November 26, 1972, Gregory Nickells was shot and killed while sitting in his car with a female companion, Ranelle Stanger, at a remote overlook near the city of Vernal in Uintah County, Utah. Ms. Stanger, along with Mr. Nickells' body, was driven around for some time by the murderer and his companion. Ms. Stanger was raped

by each man and eventually released. Mr. Nickells' car was set on fire, with his body inside.

Ms. Stanger gave a lengthy statement at the time of the murder and rape, describing the incident and the two perpetrators. Approximately one and one-half years later, in March 1974, a Salt Lake County Sheriff's Office detective met with Susan Dixon, Mr. Taylor's stepdaughter, who gave a statement implicating Mr. Taylor in the Nickells murder. Soon thereafter Ms. Dixon gave another statement to the detective and the Salt Lake County Attorney. However, no arrests were made and the case became inactive.

In 1990, defendant Lloyd Meacham was elected Sheriff of Uintah County. He reopened the Nickells murder case and conducted further investigation. He found the statement of Susan Dixon, reinterviewed her twice and reinterviewed Ms. Stanger twice. He eventually went to the Uintah County Attorney, Harry Souvall, with the evidence he had collected. Mr. Souvall authorized prosecution pursuant to Utah Code Ann. §§ 17-18-1(1)(b), (3)(b), and 77-2-1. Sheriff Meacham prepared an Affidavit of Probable Cause and executed it on August 11, 1992, before Judge A. Lynn Payne, who issued a warrant for Mr. Taylor's arrest. Mr. Taylor was arrested at his home in Salt Lake City on August 12, 1992, and charged with first degree murder. Pursuant to his wife's consent, Mr. Taylor's home and cars were searched.

On September 10 and 11, 1992, a preliminary hearing was conducted before Judge John R. Anderson. Mr. Taylor was represented by counsel. Both his stepdaughter, Susan Dixon, and Ms. Stanger testified, as well as other

witnesses. The court found the evidence sufficient to establish probable cause and bound Mr. Taylor over for trial.

Subsequently, before Mr. Taylor was tried for the murder and rape, a pair of unlabeled women's pants were found in the evidence area of the Uintah County Sheriff's Department. No one, including Ms. Stanger, could positively identify them as belonging to Ms. Stanger. They were nonetheless sent to a crime lab for analysis, and the DNA results from evidence on the pants did not match Mr. Taylor's DNA. The prosecutor, Mr. Souvall, thereafter dropped the charges against Mr. Taylor. Mr. Taylor had been incarcerated in the Uintah County jail for seven weeks before he was released. This § 1983 action followed.

In his complaint, Mr. Taylor alleged that Sheriff Meacham's investigation and his decision to charge Mr. Taylor were "done with reckless disregard for the actual facts and included willful misstatements of fact and lies to individuals who were interviewed, to prosecutors, and to courts." Am. Compl. at ¶ 14, Appellant's App. at 3. He further alleged that the arrest was "without probable cause and constitutes circumstances of wrongful arrest and malicious prosecution." *Id.* at ¶ 15. He alleged that the above actions amounted to a denial of due process. He sued Sheriff Meacham in his individual capacity and in his official capacity as the "final policymaking authority" for Uintah County. *Id.* at ¶¶ 21-22, Appellant's App. at 6. He included supplemental state law causes of action for malicious prosecution, false imprisonment and false arrest. He sought actual damages, punitive damages and attorney's fees.

Sheriff Meacham filed motions for summary judgment, on the ground that he was qualifiedly immune from suit in his individual capacity and on the ground that he, in his official capacity, and Uintah County, were immune from suit because the allegedly unlawful actions taken against Mr. Taylor were not pursuant to a custom or policy, nor was Sheriff Meacham the final policy-making authority for either investigations or prosecutions. Mr. Taylor filed a cross-motion for partial summary judgment. The district court granted Sheriff Meacham's motions, both in his individual and his official capacities, and the motion of Uintah County, and denied Mr. Taylor's motion for partial summary judgment.[1]

DISCUSSION

We review the district court's grant of summary judgment de novo. *Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1026 (10th Cir. 1994). When a defendant asserts

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[1] The district court granted defendants' motions and denied Mr. Taylor's with little explanation, stating as follows:

> (1) the Motion of Uintah County and Sheriff Meacham in his Official Capacity for Summary Judgment, for the reasons stated in defendants' memoranda and on the record is granted, and Plaintiff's Cross-Motion for Partial Summary Judgment is denied for the same reasons; and
>
> (2) the Motion of Lloyd Meacham in his Individual Capacity for Summary Judgment is granted on the grounds that immunities apply to him under the circumstances, that he was at least qualifiedly immune.

Summ. J. at 2, Appellant's App. at 326.

qualified immunity in a summary judgment context, "we apply special rules to determine whether the motion was properly granted or denied." *Pino v. Higgs*, 75 F.3d 1461, 1467 (10th Cir. 1996). We must "first ask if a plaintiff has asserted the violation of a constitutional right at all, and then assess whether that right was clearly established at the time of a defendant's actions." *Id.* (quoting *Gehl Group v. Koby*, 63 F.3d 1528, 1533 (10th Cir. 1995)); *see Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."). Thus, to avoid summary judgment on qualified immunity grounds, a plaintiff must " 'present facts which if true would constitute a violation of clearly established law.' " *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988) (quoting *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987)). " 'Whether an asserted federal right was clearly established at a particular time . . . presents a question of law . . . [that] must be resolved de novo on appeal.' " *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995) (quoting *Elder v. Holloway*, 114 S. Ct. 1019, 1023 (1994) (citation omitted)).

Mr. Taylor alleges that his wrongful arrest and seven-week detention constituted an unreasonable seizure and deprivation of his liberty, in violation of the Fourth, Fifth and Fourteenth Amendments. In *Albright v. Oliver*, 114 S. Ct. 807 (1994), a plurality of the Supreme Court held that the Fourth Amendment governed "pretrial deprivations of liberty." *Id.* at 813. Fourteenth Amendment substantive due process standards have no applicability. We therefore

address Mr. Taylor's claim only in a Fourth Amendment context.

Mr. Taylor alleges wrongful arrest and malicious prosecution as the basis for his § 1983 claim. As the Supreme Court has observed, while there is " 'an embarrassing diversity of judicial opinion' " on the question of whether a malicious prosecution claim is actionable under § 1983, "[m]ost of the lower courts recognize some form of malicious prosecution action under § 1983." *Albright*, 114 S. Ct. at 811 n.4 (quoting *Albright v. Oliver*, 975 F.2d 343, 345 (4th Cir. 1992), *aff'd on other grounds*, 114 S. Ct. 807 (1994)). *See Brummett v. Camble*, 946 F.2d 1178, 1180-81 n.2 (5th Cir. 1991) (collecting cases on the question), *cert. denied*, 504 U.S. 965 (1992). Our court has recognized the viability of malicious prosecution claims under § 1983, as well as claims for wrongful arrest. *See Wolford v. Lasater*, 78 F.3d 484 (10th Cir. 1996); *Romero*, 45 F.3d 1472; *Cottrell v. City of Kaysville*, 994 F.2d 730 (10th Cir. 1993); *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992); *Robinson v. Maruffi*, 895 F.2d 649 (10th Cir. 1990).

While most circuit courts recognize that a malicious prosecution claim is cognizable under § 1983, differences arise over the elements necessary to establish such a claim. Some courts hold that the "elements of liability for the constitutional tort of malicious prosecution under § 1983 coincide with those of the common law tort." *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988); *see also Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1303 (5th Cir. 1995) ("This circuit has explicitly held that malicious prosecution, false arrest and bodily harm are actionable under Section 1983 because they violate the Fourth and Fourteenth Amendments."); *Cook v. Sheldon*, 41 F.3d 73, 79 (2d

Cir. 1994) ("Though section 1983 provides the federal claim, we borrow the elements of the underlying malicious prosecution tort from state law."); *Strength v. Hubert*, 854 F.2d 421, 425-26 (11th Cir. 1988). Other courts require the showing of an injury of a constitutional magnitude, as well as the traditional elements of the state tort of malicious prosecution. *See Singer v. Fulton County Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995) (" 'In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right;' still, it is only the violation of the constitutional right that is actionable and compensable under § 1983.") (quoting *Carey v. Piphus*, 435 U.S. 247, 258 (1978)), *petition for cert. filed*, 64 U.S.L.W. 3642 (U.S. Jan. 19, 1996) (No. 95-1452); *Kohl v. Casson*, 5 F.3d 1141, 1145 (8th Cir. 1993) ("This claim fails because a claim of malicious prosecution, without more, does not state a claim under 42 U.S.C. § 1983, which provides redress only for federal constitutional or statutory violations."); *Mahoney v. Kesery*, 976 F.2d 1054, 1060 (7th Cir. 1992) (holding that although "malicious prosecution as such" is not actionable under the Constitution, it "can be a link in a chain showing a deprivation of liberty or property without due process of law"); *Torres v. Superintendent of Police*, 893 F.2d 404, 409 (1st Cir. 1990) (plaintiff alleging malicious prosecution claim must prove elements of state malicious prosecution tort but also must show the "misuse of the legal proceedings . . . so egregious as to subject the individual to a deprivation of a constitutional dimension"); *Coogan v. City of Wixom*, 820 F.2d 170, 174 (6th Cir. 1987) (same); *Usher v. City of Los*

Angeles, 828 F.2d 556, 561-62 (9th Cir. 1987) ("[T]he general rule is that a claim of malicious prosecution is not cognizable under 42 U.S.C. § 1983 if process is available within the state judicial system to provide a remedy. . . . However, 'an exception exists to the general rule when a malicious prosecution is conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to subject a person to a denial of constitutional rights.' ") (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc) (other citation omitted)); *cf. Reid v. New Hampshire*, 56 F.3d 332, 341 (1st Cir. 1995) ("Since New Hampshire recognizes the common-law torts of false arrest . . . and malicious prosecution, . . . the claim that Reid was arrested without probable cause should have been addressed under New Hampshire law, not section 1983.").[2]

Our own circuit has not always written consistently on this issue. In *Lusby v. T.G. & Y. Stores*, 749 F.2d 1423, 1431 (10th Cir. 1984), *cert. denied*, 474 U.S. 818 (1985), we stated that "[m]alicious prosecution does not automatically constitute a denial of due process." We further

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[2] We have cited a non-exclusive list of cases addressing the availability and elements of a § 1983 action for malicious prosecution. There are others, and the general confusion surrounding this area is exemplified by the conflicting opinions within many circuits. *Compare Singer*, 63 F.3d at 116 (while common law tort actions may parallel constitutional claims, "it is only the violation of the constitutional right that is actionable and compensable under § 1983.") *with Cook*, 41 F.3d at 79 ("Though section 1983 provides the federal claim, we borrow the elements of the underlying malicious prosecution tort from state law.")

observed, however, that "if the misuse of the legal procedure is egregious there may be a deprivation of constitutional dimensions for which a plaintiff can invoke § 1983." *Id.* We reiterated that view in *Anthony v. Baker*, 767 F.2d 657, 662-63 (10th Cir. 1985).[3] In *Robinson*, 895 F.2d at 654, on the other hand, we appeared to require only the common law elements of malicious prosecution.[4] Most recently, we stated that "[i]t is generally accepted that the common law of torts is the starting point for determining the contours of a malicious prosecution claim under § 1983." *Wolford*, 78 F.3d at 489. We went on in *Wolford*, however, to consider whether the plaintiff had established a Fourth Amendment violation. Reconciling these various cases, we conclude that our circuit takes the common law elements of malicious prosecution as the "starting point" for the analysis of a § 1983 malicious prosecution claim, but always reaches the ultimate question, which it must, of whether the plaintiff has proven a *constitutional* violation. Following *Albright*, in the § 1983 malicious prosecution context, that constitutional right is

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[3] We note, however, that those decisions of our court requiring an "egregious" misuse of the legal procedure for a § 1983 malicious prosecution claim proceeded on the basis that the Fourteenth Amendment's due process clause was the relevant constitutional provision. *Albright* has changed that, holding that a § 1983 malicious prosecution claim does not implicate the Fourteenth Amendment's substantive due process standards.

[4] The Supreme Court in *Albright* cited *Robinson* as being among those circuit court cases which allow a § 1983 malicious prosecution claim to proceed with only the common law elements of malicious prosecution. *See Albright*, 114 S. Ct. at 811 n.4.

the Fourth Amendment's right to be free from unreasonable seizures.[5]

As we acknowledged with respect to New Mexico tort law in *Wolford*, lack of probable cause is an essential element of the tort of malicious prosecution under Utah tort law. *Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 158 (Utah 1991). Similarly, an arrest warrant must be supported by probable cause to comply with the Fourth Amendment. "Probable cause for an arrest warrant is established by demonstrating a substantial probability that a crime has been committed and that a specific individual committed the crime." *Wolford*, 78 F.3d at 489

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[5] As many courts have observed, in many ways *Albright* muddied the waters rather than clarified them. *Albright's* discussion about the Fourth Amendment governing pretrial deprivations of liberty is *dicta*, inasmuch as Mr. Albright never alleged a Fourth Amendment violation. Thus, the Supreme Court specifically avoided deciding whether a Fourth Amendment malicious prosecution claim would succeed.

Moreover, it is unclear how far the Fourth Amendment's protection against unreasonable "seizures" can reach in the pretrial context. In *Albright*, the petitioner, Mr. Albright, had voluntarily submitted to the arrest process, and was released after he posted bail. The Supreme Court did not decide, as it did not need to, whether he remained effectively "seized" in that situation. Justice Ginsburg's concurrence suggests a theory under which a person is effectively "seized" for constitutional purposes as long as a prosecution is pending. *See Albright*, 114 S. Ct. at 815-16 (Ginsburg, J., concurring). *See generally Reed v. City of Chicago*, 77 F.3d 1049, 1053-54 (7th Cir. 1996); *Singer v. Fulton County Sheriff*, 63 F.3d at 117 & n.6.

In this particular case, however, the "seizure" issue is fairly straightforward, because Mr. Taylor remained in detention, and therefore effectively "seized," throughout the time period in question.

(citing Fed. R. Crim. P. 4; *Wong Sun v. United States*, 371 U.S. 471, 481 n.9 (1963)).

Mr. Taylor alleges that he was illegally seized – arrested – and charged with first degree murder without probable cause. He argues that the affidavit prepared by Sheriff Meacham in support of the arrest warrant contained deliberately false statements and omissions, thereby misleading the judge into issuing the arrest warrant. "It is a violation of the Fourth Amendment for an arrest warrant affiant to 'knowingly, or with reckless disregard for the truth,' include false statements in the affidavit." *Id.* (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)). Similarly, it is a Fourth Amendment violation to "knowingly or recklessly omit from the affidavit information which, if included, would have vitiated probable cause." *Id.* (citing *Stewart v. Donges*, 915 F.2d 572, 581-83 (10th Cir. 1990)). If an arrest warrant affidavit contains false statements, "the existence of probable cause is determined by setting aside the false information and reviewing the remaining contents of the affidavit." *Id.* Where information has been omitted from an affidavit, we determine the existence of probable cause " 'by examining the affidavit as if the omitted information had been included and inquiring if the affidavit would still have given rise to probable cause for the warrant.' " *Id.* (quoting *Stewart*, 915 F.2d at 582 n.13).

Applying those principles to this case, we agree with the district court's implicit conclusion that the inaccurate statements in the arrest warrant affidavit, as well as the information omitted, would not have altered the probable

cause determination.[6] The inaccuracies Mr. Taylor points out are the following: the affidavit stated that Ms. Stanger described the perpetrator's vehicle as a "white or light col[ored] older model Chevy." Aff. of Probable Cause at ¶ 8, Appellant's App. at 257. Ms. Stanger, in her statement given immediately after the incident, stated that the car was light-colored, "maybe a cream or light gold or something" and that she thought it was a Ford. Statement of Ranelle Stanger, Appellant's App. at 143. The affidavit states that "Ranelle [Stanger] stated that the tall assailant called the trigger man 'Tex' " and that Ms. Dixon, in her 1974 interview, stated that a friend of Mr. Taylor's called him "Tex." In fact, as Mr. Taylor points out, Ms. Stanger referred to one of her assailants in her statement as "Tex" simply because he had a Texas accent, not because the other assailant called him that name. Mr. Taylor also asserts that "Sheriff Meacham in weaving together the story for the probable cause affidavit to support an arrest warrant, relied heavily on Taylor's stepdaughter," and selectively included only the inculpatory parts of her statement, while omitting the exculpatory parts. The parts he believes are exculpatory are, apparently, some statements to the effect that Mr. Taylor may have been involved in a drug deal with Mr. Nickells and perhaps Ms. Stanger. He also alleges that Sheriff Meacham ignored other witnesses who provided statements he interprets as exculpatory.

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[6] We describe the district court's findings as "implicit" because the district court granted summary judgment with little explanation, *see supra* n.1, stating that it granted the motions for the reasons set forth in defendants' memoranda, which is not a part of the record on appeal.

Against these inaccuracies are a wealth of uncontested facts which demonstrate a substantial probability that Mr. Taylor committed the Nickells murder and rape of Ms. Stanger. Specifically, the affidavit, in its concluding paragraph, summarized a number of similarities between Susan Dixon's statement and Ranelle Stanger's:

> [B]oth stated that Mr. Taylor used to brag about raping a thirteen year old girl; the trigger man stated that he owned a horse named "Trigger", this information was confirmed by Susan and Susan's sister in a conversation with Susan. Ranelle stated that the tall assailant called the trigger man "Tex." In the 1974 interview of Susan, she was asked if anyone called Taylor "Tex," she stated yes, that David Reynolds does. Evidence at the scene of the murder indicates that a .22 caliber pistol was used to murder Nickells. Ranelle stated that the trigger man used a pearl handled revolver to commit the crime. In 1974, Susan stated that Mr. Taylor carried a .22 caliber revolver and in 1992 she stated that the revolver had a pearl handle. In the 1972 interview with Ranelle she stated that the suspect drove a white or light colored Chevy or Ford with blue interior with decals in the rear window including a decal of the American Flag in the rear window. The description of the vehicle and color of interior was also confirmed in conversations with Adrian Hansen and Gene Saxton. Also, Ranelle indicated that the trigger man wore cowboy boots and western style clothing and had an intimidating personality and that he insisted on burning the Nickells vehicle after killing him. Susan indicated that Taylor wore cowboy boots and western wear in

> 1972, was a cocky braggart and would repeatedly threaten to kill certain people, including her, and burn them. Finally, Mr. Taylor came home the morning of the murder smelling like smoke and admitted to killing Nickells[7] before any report had been broadcast of the incident. Both Ranelle Stanger and Susan Dixon deny ever having met or discussing this case.

Affidavit of Probable Cause at ¶ 22, Appellant's App. at 274-75. Setting aside the false statements, about the name "Tex" and the make, and perhaps the color, of the car, and even including the omissions, which are by no means exculpatory, the affidavit contains ample facts supporting a finding of probable cause.

Moreover, Mr. Taylor has presented us with *no* evidence which even suggests that Sheriff Meacham included the false statements, or omitted any facts, knowingly or with reckless disregard for the truth, rather than out of negligence or inadvertence. We therefore conclude that Sheriff Meacham did not violate the Fourth Amendment when he presented the arrest warrant affidavit to a judge, resulting in the issuance of an arrest warrant for Mr. Taylor.

As we have indicated, Mr. Taylor remained incarcerated for seven weeks after his arrest, during which time a preliminary hearing was conducted, in which numerous witnesses testified, including Ms. Dixon and Ms. Stanger, and following which another judge determined that there

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[7] In Ms. Dixon's statement, she did not state that Mr. Taylor admitted killing Mr. Nickells by name. She stated that he told her he had killed a man in Vernal and burned his body in a car.

was probable cause to bind Mr. Taylor over for trial on the first degree murder charge. Having concluded that no Fourth Amendment violation occurred in connection with his arrest, we could proceed to determine whether Mr. Taylor's Fourth Amendment rights were violated during this seven-week period.[8]

We need not make that determination, however, because Mr. Taylor's complaint alleged no impropriety by Sheriff Meacham following his investigation and his preparation of the arrest warrant affidavit. He does not seriously allege that Sheriff Meacham made false or misleading statements following his arrest, nor that he somehow caused false or perjured testimony to be presented at the preliminary hearing.[9] As the Seventh Circuit has

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[8] As Justice Ginsburg observed in her concurring opinion in *Albright*, pursuing a malicious prosecution claim against a police officer is "anomalous." *Albright*, 114 S. Ct. at 816 n.5 (Ginsburg, J., concurring). As she explained further:

> The principal player in carrying out a prosecution – in "the formal commencement of a criminal proceeding," . . . – is not police officer but prosecutor. Prosecutors, however, have absolute immunity for their conduct. . . .
>
> By focusing on the police officer's role in initiating and pursuing a criminal prosecution, rather than his role in effectuating and maintaining a seizure, Albright's theory raises serious questions about whether the police officer would be entitled to share the prosecutor's absolute immunity.

Id. (quoting *Albright*, *id.* at 824 (Stevens, J., dissenting).

[9] In his amended complaint, Mr. Taylor alleged that Sheriff Meacham made "willful misstatements of fact and lies to individuals who were interviewed, to prosecutors, and to courts." Am. Compl. ¶ 14, Appellant's App. at 3. However, he

recently observed in a similar case, "[i]t is conceivable that a wrongful arrest could be the first step towards a malicious prosecution. However, the chain of causation is broken by an indictment, absent an allegation of pressure or influence exerted by the police officers, or knowing misstatements made by the officers to the prosecutor." *Reed v. City of Chicago*, 77 F.3d 1049 (7th Cir. 1996). Here, too, there was a preliminary hearing, which, under Utah law is an adversarial proceeding, *State v. Pledger*, 896 P.2d 1226, 1229 (Utah 1995), in which a judge independently listened to testimony, evaluated the credibility of those testifying, reviewed evidence, and concluded that the evidence was sufficient to bind Mr. Taylor over for trial. Thus, to the extent Sheriff Meacham set in motion a malicious prosecution, which we do not suggest that he did, the preliminary hearing broke the "chain of causation."[10] We therefore conclude that Sheriff Meacham did not violate Mr. Taylor's constitutional rights in connection with his arrest and incarceration.

Having concluded that no constitutional right was violated, under *Siegert*, 500 U.S. at 232, we proceed no further on the qualified immunity issue. We accordingly affirm the district court's grant of summary judgment to

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never develops this argument beyond the context of the arrest warrant, which we have discussed.

[10] Sheriff Meacham does not argue that the preliminary hearing's probable cause determination should collaterally estop Mr. Taylor from relitigating the existence of probable cause in this § 1983 action. We note that some other courts have so held. *See, e.g., Haupt v. Dillard*, 17 F.3d 285, 289-90 (9th Cir. 1994); *Coogan*, 820 F.2d at 175; *but see, Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989).

Sheriff Meacham on the § 1983 action against him in his individual capacity.

Mr. Taylor sued Sheriff Meacham in his individual and official capacities. We have already discussed the individual capacity suit, and concluded that Sheriff Meacham committed no constitutional violation. "[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Moore v. City of Wynnewood*, 57 F.3d 924, 929 n.4 (10th Cir. 1995). Thus, Mr. Taylor's official-capacity suit against Sheriff Meacham is simply a suit against Uintah County. We have held that, once we conclude that the employee – Sheriff Meacham – committed no constitutional violation, the claim against the supervisory authority – Uintah County – is properly dismissed. *Webber v. Mefford*, 43 F.3d 1340, 1344-45 (10th Cir. 1994) ("A claim of inadequate training, supervision, and policies under § 1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation by the person supervised."). We therefore also affirm the district court's grant of summary judgment to Sheriff Meacham and Uintah County in the official-capacity suit.[11]

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[11] The district court's order granting summary judgment to defendants did not specifically address Mr. Taylor's state law claims. Once a federal court dismisses claims over which it has original jurisdiction, it may decline to exercise supplemental jurisdiction over related state law claims. 28 U.S.C. § 1367(c)(3); *see Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1492 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1045 (1996).

For the foregoing reasons, the decision of the district court is AFFIRMED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION
(Filed Dec. 16, 1994)

DALE TAYLOR, Plaintiff, vs. LLOYD MEACHAM and UINTAH COUNTY, Defendants.	)	**SUMMARY JUDGMENT** Civil No. 93-C-883A Judge Bruce S. Jenkins

---

The following motions came on regularly for hearing before the Honorable Bruce S. Jenkins, United States District Judge, on the 5th day of December, 1994: (1) Motion of Uintah County, and Sheriff Meacham in His Official Capacity For Summary Judgment; (2) Motion of Lloyd Meacham in His Individual Capacity For Summary Judgment; (3) [Plaintiff's] Cross-Motion for Partial Summary Judgment.

Plaintiff was represented by his counsel, Gregory J. Sanders, and defendants were represented by their counsel, Robert R. Wallace. The Court, having heard the arguments of counsel for and against these motions, and having reviewed the memoranda supporting and in opposition to these motions as well as the affidavits and other materials submitted with such memoranda, having reviewed the file, and being fully advised in the premises, ruled as follows:

(1) the Motion of Uintah County and Sheriff Meacham in his Official Capacity for Summary Judgment, for reasons stated in defendants' memoranda and on the record is granted, and Plaintiff's Cross-Motion for Partial Summary Judgment is denied for the same reasons; and

(2) the Motion of Lloyd Meacham in his Individual Capacity for Summary Judgment is granted on the grounds that immunities apply to him under the circumstances, that he was at least qualifiedly immune from suit.

Based on the foregoing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion of Uintah County, and Sheriff Meacham in his Official Capacity for Summary Judgment is granted, and Plaintiff's Cross-Motion for Partial Summary Judgment is denied; furthermore, the Motion of Lloyd Meacham in his Individual Capacity for Summary Judgment is granted, and the Complaint of plaintiff Dale Taylor is hereby dismissed with prejudice and upon the merits.

DATED this 16 day of Dec., 1994.

BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
United States
District Judge

Submitted by:

HANSON, EPPERSON & SMITH

/s/ Robert R. Wallace
ROBERT R. WALLACE
BRUCE M. PRITCHETT, JR.
Attorneys for Defendants

Approved as to form:

Kipp & Christian

/s/ Gregory J. Sanders
GREGORY J. SANDERS

United States District Court
for the
District of Utah
December 20, 1994

MAILING CERTIFICATE OF CLERK

Re: 2:93-cv-00883

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Supreme Court, U.S.
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AUG 20 1996
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(2)

No. 96-211

In The

Supreme Court of the United States

October Term, 1995

DALE TAYLOR,

Petitioner,

vs.

LLOYD MEACHAM and UINTAH COUNTY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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ISSUES PRESENTED FOR REVIEW

Whether this Court should reassess the complex, voluminous facts and determine the propriety of the factual analysis made by the Tenth Circuit Court of Appeals, through which analysis Petitioner was denied relief?

Whether this Court should give an advisory opinion on the existence of a federal claim for malicious prosecution, where 1) a decision that such a cause of action exists would merely affirm the Tenth Circuit Court of Appeals' recognition of such a cause, yet leave Petitioner without relief because, as a matter of fact, he was not entitled to relief under such a cause of action, and 2) a decision that no such cause of action exists would eliminate the legal basis of Petitioner's claims, also leaving him without relief?

If there is a federal cause of action for malicious prosecution, whether this Court should issue an advisory opinion clarifying the elements thereof, where all circuit courts agree that one element is lack of probable cause, and where Petitioner's claims were dismissed because factually there was ample probable cause for the actions taken against him?

LIST OF ALL PARTIES

The caption in this Court contains the names of all of the parties.

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CITATIONS OF THE OFFICIAL REPORT

Taylor v. Meacham/Uintah County, 82 F.3d 1556 (10th Cir. 1996)

STATEMENT OF BASIS OF JURISDICTION

The Petitioner has 90 days from the date of judgment to petition this Court for certiorari. Judgment was entered May 7, 1996. Jurisdiction is not contested under 28 U.S.C. § 1254 and Rule 10, Rules of the Supreme Court of the United States (1995).

STATEMENT OF THE CASE (FACTS)

Petitioner was arrested pursuant to warrant and charged with an eighteen year old homicide. After having been bound over for trial following a two-day preliminary hearing, DNA results from some untagged, unidentified women's pants, which may or may not have been the victim's, resulted in the prosecutor dismissing the charges. Petitioner sued for malicious prosecution. The district court granted summary judgment. The Tenth Circuit Court of Appeals affirmed.

A. The crime, generally, and the initial probable cause regarding the Petitioner.

1. On or about November 26, 1972, a murder occurred in Uintah County, Utah (hereafter the "County"). Gregory Nickells was shot and killed while sitting in his car with a female companion at a remote

overlook. The female companion, Ranelle Stanger (hereafter sometimes referred to as "the Victim"), was raped and eventually released by the murderer and his companion.

2. After the homicide, Susan Dixon, Petitioner's Stepdaughter (hereafter "the Stepdaughter") talked to Detective Ladd of the Salt Lake County Sheriff's Office, declaring that her stepfather, the Petitioner, had admitted to the murder under circumstances which indicated his involvement. (Supp. App.[1] at 1-150.) See paras. 25-32, below, for details.

3. She was so reliable that a recorded statement was taken from her, before Detective Ladd and Don Sawaya of the Salt Lake County Attorney's Office. (Supp. App. at 1-14.)

4. Susan Dixon was even willing to take a polygraph examination concerning her statements. (Supp. App. at 14.)

5. Her statement was so reliable that it was sent to Arden Stewart, the Uintah County Sheriff, for his use. However, Sheriff Stewart does not recall ever having received the transcribed statement. (Supp. App. at 192.)

6. Sheriff Stewart later opined that that statement must have been accidentally placed in an inactive or completed portion of his investigation file. (Supp. App. at 196.)

7. Sheriff Stewart's investigation became inactive.

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[1] References to Supp. App. are to the Supplemental Appendix filed with the Tenth Circuit Court of Appeals.

B. Additional investigation by Sheriff Meacham.

8. In 1991, Lloyd Meacham, the Respondent herein (hereafter "the Sheriff"), was Sheriff of the County and began to review the unsolved murder. (Supp. App. at 203.)

9. He came across the transcribed statement of Susan Dixon and found it so reliable that he began doing follow-up on it. (Supp. App. at 212, 462.)

10. He re-interviewed the Stepdaughter (by then Susan Dixon Saxton) twice. (Supp. App. at 15-65, 203-204, 210-217).

11. He re-interviewed the Victim (by then Ranelle Simmons) twice. (Supp. App. at 206-210, 219-254, 255-271.)

12. He did significant other follow-up investigation.

C. Independent actions by the County Attorney and Judges leading to Petitioner's arrest and incarceration.

13. Eventually, Sheriff Meacham went to the Uintah County Attorney with the evidence for screening for prosecution. The County Attorney, in an independent review, found the information so reliable that he felt sufficient probable cause existed and authorized prosecution pursuant to Utah Code Ann. § 17-18-1(1)(b) and (3)(b); § 77-2-1; Rule 5(b) Ut.R.Crim.Proc.

14. An Affidavit of Probable Cause concerning the murder was prepared; it was executed by Sheriff Meacham before the Honorable A. Lynn Payne, State District

Judge, on or about August 11, 1992, who issued an arrest warrant. (Supp. App. at 197-218, 292).

15. On September 10, and 11, 1992, a two-day preliminary hearing was held before a different judge, the Honorable John R. Anderson. Petitioner was represented by counsel, and confronted the witnesses against him. (Supp. App. at 66-150, 151-196, 273-384, 385-415, 416-427, 428-437, 438-460, 461-501.) The witnesses included the Stepdaughter and the Victim. (Supp. App. at 66-150, 273-384.)

16. After the preliminary hearing, the court found the testimony of the Stepdaughter and the Victim sufficient for probable cause and bound the Petitioner over for trial.

D. The Murder, Kidnapping and Rape.

17. The Victim stated that on November 26, 1972, she and a Gregory Nickells had parked at an overlook near Vernal, Utah in the evening. (Supp. App. at 198, 206, 307-308.)

18. A stranger tapped on the car window, indicating that he had had car trouble. (Supp. App. at 198, 206, 310.) The stranger then pulled a gun and shot Greg several times. (Supp. App. at 198, 313.) The Victim describes the shooting in some detail, including seeing fire shoot out of the muzzle of the gun, a fact relating to shooting not generally known unless experienced. (Supp. App. at 207, 502.)

19. The murderer then got into the car, pushing Greg over onto the Victim, and drove away. (Supp. App.

at 198, 314), soon linking up with another car driven by an accomplice. (Supp. App. at 198-199, 207, 279, 324, 326.)

20. Eventually the Victim was raped by the murderer (Supp. App. at 199, 207, 280, 325, 505), and later by the accomplice (Supp. App. at 199, 207, 285, 340, 342, 343, 507).

21. The perpetrators eventually burned Greg's car with his body in it. (Supp. App. at 199, 207.)

22. The perpetrators eventually released the Victim who ran to a rural home, where she broke down emotionally in front of the residents, which added to her credibility. (Supp. App. at 200, 508.)

23. The authorities found the burned car with Greg's body in it, consistent with her story. (Supp. App. at 153, 201.)

24. The Victim was examined at a hospital, and given a polygraph, showing her reliable. (Supp. App. at 240-241.)

E. Probable Cause for Petitioner's Arrest.

The following probable cause known to the Sheriff is just part of the evidence of guilt known at the time. Evidence is often broken into two parts, (a) evidence known prior to arrest, most of which was presented in the affidavit for the search warrant, and (b) corroborating evidence known after arrest.

(1) Petitioner admitted/confessed to committing the murder under circumstances which indicated that he did.

(a) Probable Cause Known Prior to Petitioner's Arrest.

25. The Stepdaughter stated[2] and testified[3] that on November 26, 1972, her stepfather, the Petitioner, came home in Salt Lake City about 10:00 a.m. (Supp. App. at 1, 204.)

26. He was "upset, anxious, pacing, paranoid." (Supp. App. at 1, 2, 68, 144-145, 204.)

27. He smelled like a bonfire, strong smoke smell. (Supp. App. at 1, 204-205, 213.)

28. He left and returned at 7:00 p.m., still "paranoid, anxious." (Supp. App. at 1, 16, 144, 204, 213.) He kept looking outside through the curtains. (Supp. App. at 204-205.) She testified, "I've never seen him like that. I've seen him a lot of ways, but not like that." (Supp. App. at 144-145, 205.)

29. When asked why he was so nervous, he confessed that he had "just killed a guy, shot him and then burned him up in a car." (Supp. App. at 2, 7, 15, 70, 120-121, 143-144, 145.)

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[2] References to statements or reporting are to statements given other than testimony.

[3] References to testifying are to the preliminary hearing testimony.

30. He stated that he had killed the man over a drug deal which had gone sour, and mentioned the name of the murder victim, Nickells. (Supp. App. at 121, 202, 204.)

31. Later, on the 10:00 p.m. news, the Stepdaughter heard of the homicide in Vernal and the Victim's having been burned in his car, just as the Petitioner had described. (Supp. App. at 5, 15, 22, 119, 205, 211.)

32. He described what had happened "before it was even on the news." (Supp. App. at 15, 119, 205, 211.) Detective Ladd verified that the first news report of the incident was at 10:00 p.m., enhancing the Stepdaughter's reliability.

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

33. Timothy Kent Redman was a prisoner housed in the cell with the Petitioner during Petitioner's preliminary hearing. After he talked with the Petitioner, he wrote down notes of the conversations, and gave a statement. (Supp. App. at 510-519.)

34. Petitioner told his cellmate that his:

> [D]aughter-in-law remembers what he said that day after he killed soldier boy. Whatever that means. Okay, um, said his wife is scared, won't say anything against him because she's scared to.

(Supp. App. at 511.) The mention of "soldier boy" added reliability to the cellmate. The murder Victim had

recently been discharged from the service, a fact unknown to the cellmate.

35. The cellmate stated:

> Then he [Petitioner] . . . said something after [the] preliminary [hearing] that he was lucky that the chick that was in the car couldn't remember that he was left handed 'cause somethin about twirling a gun. He was twirlin' a gun and she remembered the wrong hand so he was really lucky.

(Supp. App. at 511.)

36. Redman continued:

> Apparently somethin' happened. He said they drew a picture of the cowboy hat on him and she, he was scared she was goin' to remember him that way with the hat on it. He was nervous about that. I don't know if that makes any sense. It, its somethin' he really rattled on a lot about the cowboy hat. Scared she might, scared because she remembered he was a cowboy . . .

(Supp. App. at 512.)

37. He continued:

> That he felt good that she couldn't remember he was left handed. He said that *she remembered me twirling the gun around* but she thought I was doin' it with this hand while I was driving. He goes it was the other way.

(Supp. App. at 514.)

(2) Petitioner did have drug dealings in the Vernal area and knew the area well.

(a) Probable Cause Known Prior to Petitioner's Arrest.

38. The Petitioner dealt drugs and often went to Uintah County for that purpose. (Supp. App. at 2, 9, 19, 134.)

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

39. David Reynolds, a close friend of Petitioner during 1972, was aware of Petitioner's large drug dealings in that area. (Supp. App. at 386, 390, 405.)

40. Steven Allred, an alcohol/drug rehabilitation director and counselor, a reformed drug user (Supp. App. at 417), knew the Petitioner in 1972, and his drug dealings in Uintah County. (Supp. App. at 417-418.) Petitioner went there several times a week to sell drugs. (Supp. App. at 2, 7, 9, 19, 67, 100, 389, 417-418, 419, 672, 683-684, 706.)

41. George D. McKinney, a resident of the area, recognized Petitioner's picture from the newspaper, and identified him as being there shortly before the murders.

(3) Petitioner denied knowledge of any contacts with the Duchesne/Vernal area.

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

42. After his arrest, Plaintiff denied to the police that he had ever been in the Uintah County area. (Supp. App. at 475, 481, 716.) Later, he indicated that he had been in that area only once eight years before. (Supp. App. at 525-526.)

(4) The murderer bragged of raping a thirteen year old, as did Petitioner.

(a) Probable Cause Known Prior to Petitioner's Arrest.

43. The Victim testified and reported that the killer said he had raped a thirteen-year-old girl and bragged about other rapes. (Supp. App. at 208, 227, 334, 372, 502, 508.)

44. The Stepdaughter testified and stated that several times the Petitioner had bragged about raping a thirteen-year-old. (Supp. App. at 4, 71, 126, 128, 208, 213.)

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

45. Steven Allred and David Reynolds testified and had reported that after the homicide Petitioner bragged about rapes, including one in the Uintah County area. (Supp. App. at 405, 420, 421, 540, 576-577, 671, 675.)

(5) The murderer was enamored with cowboy outlaws, as was Petitioner, both even stating they were descended from outlaws.

(a) Probable Cause Known Prior to Petitioner's Arrest.

46. The Victim testified and had reported that the killer talked a lot about the Old West and being like western outlaws like Jesse James. (Supp. App. at 199-200, 208, 219-220.)

47. The killer even talked of having horses ready for a getaway, as if pretending to be a western outlaw. (Supp. App. at 199, 208-209, 287, 333, 507.)

48. The Victim testified and reported that the killer played with his gun a very lot. (Supp. App. at 504.) He "enjoyed his gun," and was "very busy with it." (Supp. App. at 278.)

49. The Stepdaughter testified and earlier stated that Petitioner had a lot of interest in western outlaws. (Supp. App. at 214.) He even named one of his sons, "John Wesley" after the Old West outlaw John Wesley Harden. (Supp. App. at 73.) "Western outlaws were like his heroes and he would play like he was one." (Supp. App. at 73, 214.) He "fantasized western." (Supp. App. at 80.) He stated he was descended from a western outlaw. (Supp. App. at 214.) He twirled and played with his gun a lot. (Supp. App. at 214-215.)

50. The Stepdaughter testified that Petitioner had a lot of books in his home about Old West outlaws. (Supp. App. at 73.) See para. 54, below, corroborating her statement.

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

51. Petitioner's wife confirmed Petitioner's strong interest in Old West outlaws. (Supp. App. at 661.)

52. David Reynolds testified that the Petitioner "admired the old west," and tried to be like John Wesley Harden, after whom he named his child (Supp. App. at 387, 541), and Jesse James and Dillinger (Supp. App. at 387), and had a lot of western books (Supp. App. at 578-579).

53. He twirled his gun (Supp. App. at 403, 541-542), and claimed to be a descendant of Butch Cassidy. *Id.* Petitioner played with guns a lot, twirling them and showing them off. (Supp. App. at 389, 419.)

54. The search of Petitioner's home revealed the following old west books which corroborated the Stepdaughter and Mr. Reynolds:

a. A Dynasty of Western Outlaws

b. The Complete and Authentic Life of Jesse James

c. Who Rides with Wyatt

d. The Dalton Gang

e. They Died with Their Boots On

f. Doc Holiday

g. The Dillinger Days

h. Wild, Woolly & Wicked

i. The Great Train Robbery

j. Rifle for Rent

(6) Petitioner denied any interest in cowboys.

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

55. Petitioner denied he ever had interest in western outlaws or cowboys. (Supp. App. at 735.)

(7) The killer talked of his horse named Trigger, as did Petitioner.

(a) Probable Cause Known Prior to Petitioner's Arrest.

56. The Victim testified and had stated that the killer talked about horses and indicated that he had a horse named Trigger. (Supp. App. at 199, 209, 282.)

57. The Stepdaughter testified that she believed earlier in his life Petitioner had horses. (Supp. App. at 205, 215.) He had talked of a horse named Trigger, but that may have been a fantasy, she said. (Supp. App. at 27, 80, 199-200, 215.)

(8) The killer wore cowboy boots the same size as those of Petitioner in length of heel and width of sole.

(a) Probable Cause Known Prior to Petitioner's Arrest.

58. The killer wore cowboy boots. (Supp. App. at 217.)

59. The Stepdaughter stated that the Petitioner wore cowboy boots. (Supp. App. at 217.)

60. Reynolds testified Petitioner would "always wear cowboy boots." (Supp. App. at 387, 561-562.)

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

61. At the crime scene, plaster casts were made of cowboy boot prints where the killer walked. The casts matched boots of the Petitioner almost exactly. (Supp. App. at 482.)

(9) The car used by the murderer had orangeish colored, lace-up work boots like those worn by the Petitioner.

(a) Probable Cause Known Prior to Petitioner's Arrest.

62. Inside the car of the perpetrators was a pair of "orangeish color" work boots which lace up the front. (Supp. App. at 200, 296, 324, 507.)

63. The Stepdaughter described Petitioner's work boots as "burnt orange/tan." (Supp. App. at 28, 206.) Allred testified that Petitioner had "reddish tan" work boots which lace up the front. (Supp. App. at 422, 427, 693.) Petitioner's wife also confirmed such boots. (Supp. App. at 635.)

(10) The killer got upset when his accomplice called him a name which could have been a unique nickname of Petitioner.

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

64. The Victim testified and had stated that the accomplice called the killer "Robert, . . . or something that sounds like Robert. . . . " She could not hear the exact name. (Supp. App. at 283, 331, 336-337, 370, 509.) The killer became very upset and thereafter the killer and the accomplice began to call each other George I and George II. (Supp. App. at 283, 509.)

65. David Reynolds and the Stepdaughter testified that the Petitioner had a unique nickname, "Redbird," (Supp. App. at 102, 398). Paul Champneys so stated also. (Supp. App. at 776, 780, 807, 809.)

(11) The killer used a revolver with a pearl or light handle, as did Petitioner.

(a) Probable Cause Known Prior to Petitioner's Arrest.

66. The killer's revolver which he used had light-colored, or pearl handles. (Supp. App. at 217, 316.)

67. The Stepdaughter stated Petitioner had a pearl handled revolver. (Supp. App. at 217.)

68. The Petitioner had been arrested with a pearl handled revolver. (Supp. App. at 443.)

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

69. David Reynolds testified that the Petitioner had a pearl handled revolver. (Supp. App. at 388.)

(12) The car used by the killer was light-colored with an American flag and another decal, as was Petitioner's car.

(a) Probable Cause Known Prior to Petitioner's Arrest.

70. The Victim testified and had reported that the car which the killer and the accomplice occupied, which she only saw at night under artificial light, was "light colored." (Supp. App. at 198, 502, 503, 509.) She stated, "light color, maybe a cream or light gold or something." (Supp. App. at 509.) She also stated: "The only thing I

could notice was it was a light-colored car." (Supp. App. at 502.)

71. The Victim testified and had reported that the car had two decals in a back window: an American flag, and another about Jackson Hole. (Supp. App. at 200, 288, 509.)

72. The car had a square trunk. (Supp. App. at 509.) The killer cussed it as a Ford, either its real make or merely an epithet about how it ran. (Supp. App. at 509.)

73. The Stepdaughter testified and had reported that her mother's car, a white Chevrolet, 1963, had two stickers in a back window, one an American flag, but she didn't know what the other was. (Supp. App. at 69, 103, 216.)

(b) Probable Cause Known Shortly After Arrest Corroborating the Original Probable Cause.

74. The Petitioner and his wife had been to Jackson Hole before the homicide, and they did collect window stickers. (Supp. App. at 630, 632.)

MISSTATEMENTS OF FACT

While Petitioner's statement that the victim, Stanger, never identified Petitioner (Pet. at 3) is true, it implies that he was never identified. However, his stepdaughter, to whom he confessed the crime, clearly identified him.

Petitioner declares that the individual defendant falsely stated to the victim that someone in a photo line-up had confessed (Pet. at 3). One of the persons in the line-up, the Petitioner, had confessed to his stepdaughter. See Statement of Case, above, at paras. 25-32. The victim, who had only seen the killer at night, could not identify the Petitioner, but also could not exclude him.

The Petitioner did fit the description of the assailant, contrary to Petitioner's allegation.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

42 U.S.C. § 1983; Fourth Amendment to the Constitution; Fourteenth Amendment to the Constitution.

SUMMARY OF ARGUMENT

Because the lower court recognized a federal cause of action for malicious prosecution, Petitioner's request for this Court to recognize such a cause of action would only result in an advisory opinion. If this Court also recognizes such a cause of action, the Petitioner will not obtain relief because the lower court also found that factually the Petitioner was not entitled to relief under such a cause of action. If this Court does not recognize such a cause of action, the legal basis for Petitioner's claim fails, and he is again without relief through an advisory opinion.

All of the circuit courts agree that the common law elements of the tort of malicious prosecution, including lack of probable cause, are elements of a federal cause of action, although the circuit courts may disagree on additional elements. Because the lower court in this case found ample probable cause, any resolution of the elements by this Court, which would undoubtedly include lack of probable cause, would leave Petitioner with no relief, and this Court's opinion would again be advisory only.

Petitioner's real criticism is with the lower court's analysis of massive, complex facts, which this Court rarely reviews.

ARGUMENT

POINT I

PETITIONER ASKS THIS COURT TO REASSESS IMMENSE FACTUAL DATA, NOT A USUAL FUNCTION OF THIS COURT.

This Court rarely accepts certiorari to reassess a lower court's factual analysis. See, e.g. Rules of the Supreme Court of the United States, Rule 10 (1995); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.); *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of certiorari which presented primarily a factual question, "which does not merit Court review."); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (This Court is "a court

of law . . . rather than a court for correction of errors in fact finding . . . ").

Petitioner states that the only issue in his Petition is the simple legal issue concerning the existence of a federal malicious prosecution claim. *See* Petition at p.i: Question Presented. However, Petitioner's real complaint is with the lower court's factual analysis concerning the application of malicious prosecution to him which resulted in a finding that Petitioner was not entitled to relief.

Petitioner spends most of his argument in his Petition excoriating the Court of Appeals for its factual analysis under malicious prosecution. *See, e.g.* Petition at pp. 12-14, 11. Only page 15 of his Petition sets out Petitioner's argument with respect to the only question he declares as being at issue. The following are partial quotes from the Petition herein which illustrate that Petitioner's concern is with the lower court's factual analysis: **"A. Factual Problems,"** (Pet. at 12; bold in the original); "two flaws in its [the lower court's] factual analysis . . . " *Id.*; "This [factual] analysis initially fails because . . . " *Id.*; "The analytical approach [concerning the facts] . . . reenforces the very evil . . . " *Id.*; "The factual analysis . . . fails in the reality . . . " *Id.*; "The analysis . . . whereby it [the lower court] ignored exculpatory information . . . " (Pet. at 13); "The second major problem with the factual analysis . . . demonstrates the analysis was erroneous." *Id.*; " . . . yet another example of how the Tenth Circuit . . . did not contemplate the record before it . . . " (Pet. at 14); "In summary, the factual analysis . . . " *Id.*; "The Tenth Circuit substituted its factual judgment for that of . . . " *Id.*

Factually this case is immense. Petitioner himself admits that "hundreds of pages of documents exist with respect to the investigation" at issue. (Pet. at 3.) This Court rarely engages in reviews of such issues and materials, and no reason exists for it to do so here.

In addition, Petitioner's claimed legal issue (even if the legal issue is viable, which is disputed, see Point II, below), is so factually intertwined and enmeshed that this Court would need to reanalyze the complex facts in order to grant Petitioner relief. See Point II, below.

POINT II

A DECISION ON THE ASSERTED LEGAL ISSUE WOULD NOT PROVIDE PETITIONER ANY RELIEF AND WOULD BE AN ADVISORY OPINION.

This Court does not give advisory opinions. *National Bank of Oregon v. Insurance Agents*, 508 U.S. 439, 446, 113 S.Ct. 2173 (1993), citing *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330 (1975) ("a federal court [lacks] the power to render advisory opinions . . . ").

(THE EXISTENCE OF A MALICIOUS PROSECUTION CLAIM)

In the present case, Petitioner brought a malicious prosecution action under 42 U.S.C. § 1983. Petitioner admits that the Tenth Circuit Court of Appeals found in his favor that such a cause of action exists (Pet. at 6, 11, and 15), and that a majority of the circuit courts also recognized such a cause of action (Pet. at 7). The lower court found, however, that Petitioner was not entitled to

relief factually under malicious prosecution. See Point I, above.

Because the lower court recognized a cause of action for malicious prosecution and yet factually found the cause inapplicable to Petitioner, this Court's affirmance of the lower court's recognition of malicious prosecution would not provide relief to Petitioner. Factually, the cause of action would still not apply to Petitioner, and the opinion would be advisory only. On the other hand, a holding by this Court that there is no such cause of action would also afford Petitioner no relief, because Petitioner relied on such a cause. Again, the opinion would be advisory.

(ELEMENTS OF A MALICIOUS PROSECUTION CLAIM)

Petitioner argues that this Court should resolve the varying way the circuit courts describe the elements of malicious prosecution. However, Petitioner would realize no relief from such a resolution.

The primary difference among the circuit courts regarding the elements of malicious prosecution is whether the elements comprehend 1) only the common law elements of the tort, or 2) those common law elements plus a constitutional violation. (See the Tenth Circuit Court's synopsis of the circuit court cases at Pet. App. at 7-10.) All of the circuit courts require, at least, the common law elements. *Id.* Petitioner admits that the Tenth Circuit Court, "reconciling" prior Tenth Circuit cases, held that a malicious prosecution analysis starts

with "the common law elements of malicious prosecution," but ends with necessary proof of a "constitutional violation." (Pet. at 10; App. at 10.)

Lack of probable cause is one of the common law elements as recognized by all of the circuit courts. Because the lower court found as a matter of factual analysis that ample probable cause existed (Pet. App. at 11-16), under any recitation of elements, which would undoubtedly include lack of probable cause, Petitioner's claim fails. Therefore, any resolution of the elements of malicious prosecution by this Court would afford Petitioner no relief and would again amount only to an advisory opinion.

Petitioner fails to show how the lower court's recitation of the elements resulted in error to him, nor how an allegedly more appropriate recitation of elements, which again would undoubtedly include lack of probable cause, would change the result in his case, considering the immense weight of the facts against him. In short, Petitioner merely seeks an advisory opinion on malicious prosecution and the elements thereof.

(LACK OF IMPORTANCE)

This case is not of great public importance or interest. By holding that a malicious prosecution action exists, and properly holding that lack of probable cause is an element thereof, the lower court has, at most, provided potential federal protection to some persons oppressed by law enforcement. By finding, however, that Petitioner did not factually carry the day, the lower court also

protected law enforcement officers who acted appropriately on weighty probable cause. Petitioner is also not harmed because, factually, he was never entitled to relief under malicious prosecution. This Court's eventual opinion of the lower court's recognition of malicious prosecution and the elements thereof should await a proper case and controversy which may provide the appropriate importance for consideration by this Court.

CONCLUSION

This Petition should be dismissed as frivolous because Petitioner has shown no way in which he was prejudiced by the lower court's recognition of a malicious prosecution claim or the elements thereof, and because his only real complaint is with the lower court's factual analysis of immense probable cause.

RESPECTFULLY SUBMITTED this 20th day of August, 1996.

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